The Hartford Insurance Company (Singapore) Ltd v Chiu Teng Construction Pte Ltd [2002] SGCA 5

Case Number : CA 600079/2001

Decision Date : 24 January 2002

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; L P Thean JA; Yong Pung How CJ

Counsel Name(s) : Teo Weng Kie (Khattar Wong & Partners) for the appellant; Michael Eu (Comlaw LLC) for the respondent

Parties : The Hartford Insurance Company (Singapore) Ltd — Chiu Teng Construction Pte Ltd

Insurance – Liability insurance – Indemnity – 'All risk' policy – Third party claims – Insured causing damage to property resulting in loss to third party – Insured subsequently wound up – Judgment obtained by third party against insured – Action by third party against insurers for judgment sum – Insurer aware of third party's claim against insured but not getting involved – Whether judgment between insured and third party binding on insurer – Third's party right of subrogation – Whether insurer may reopen issue of amount of third party's loss or liability – s 1(1) Third Parties (Rights against Insurers) Act (Cap 395, 1994 Ed)

395) – Construction of s 1(1) – Whether earlier judgment binding on insurer – Whether s 1(1) requires third party to prove the extent of the insured's liability once again

The respondents, Chiu Teng, were the main contractors of a housing development know as "The Countryside" (the "estate"). Sometime in early January 1996, Brentford Construction, which was carrying out construction work at an adjacent lot to the estate, caused damage to some of the houses in the estate. As a result of the damage, Chiu Teng had to carry out rectification works and sought to recover the loss it suffered on account of the rectification works from Brentford. On 24 April 1998, Brentford was wound up by an order of court and the Official Receiver was appointed as liquidator. In view of Brentford's winding up, Chiu Teng had to obtain leave of court to commence proceedings against it. On 11 May 1999, an interlocutory judgment was obtained with the consent of the Official Receiver. On 30 May, judgment for the sum of $ 466,600.08 was granted to Chui Teng. Hartford who was informed of this action chose not to get involved as it felt that it was not liable to Brentford under the policy.

Chiu Teng, in reliance of s 1(1) of the Third party (Rights against Insurers) Act commenced the present action against Hartford seeking payment of the judgment sum. In the court below, Harford raised two main lines of defence. The first line related to policy defences which the court ruled was without any merits. The second line of defence was that the judgment sum obtained by Chiu Teng against Brentford was not binding on Hartford and that Chiu Teng should prove all over again the quantum of the loss. In this defence, Hartford did not dispute Brentford's liability to Chiu Teng, but only the reasonableness of the latter's claim. The trial judge held that Hartford was, by virtue of the earlier judgment, estopped from challenging the extent of liability or the quantum which the court had held Brentford to be liable to Chiu Teng. This was because under the insurance policy, Brentford was entitled to be indemnified by Hartford as to the judgment sum. Since under s1(1) of the Act, following the winding up of Brentford, Chiu Teng stepped into the shoes of Brentford, Chiu Teng should

similarly be entitled to be indemnified by Hartford. Hartford appealed against the trial judge's ruling that the earlier judgment obtained by Chiu Teng against Brentford was binding and conclusive as against Hartford. It contended that estoppel does not apply in the present case and that it is entitled to question the quantum of the loss suffered by Chiu Teng.

Held, dismissing the appeal :

(1) A judgment is generally only binding as between the parties to the action, except in the case of an express indemnity given by a third party to a party to the action: see Mercantile Investment & General Trust. At common law, Chiu Teng would have no claim against Hartford, the insurer: Re Harrington Motor Co [1928] 1 Ch 105. However, because of the winding up of Brentford, s 1(1) enables Chiu Teng to step into the shoes of Brentford. Brentford's right to be indemnified in respect of the liability is, under s 1(1), transferred to Chiu Teng. (25 – 26)

(2) It is not open to Hartford, who was notified of the previous action, to reopen the question of quantum of loss. Judgment had already been obtained on that. To permit such a challenge as to the extent of liability of Brentford to Chiu Teng, and consequently the quantum thereof, would risk there being an inconsistent judgment and the insured being indemnified less (or none at all) than what the policy provides. And as by virtue of s 1(1), Chiu Teng stepped into the shoes of Brentford, Chiu Teng should be indemnified by Hartford. There is no question of Chiu Teng being given any additional advantage which would not be available to Brentford in any action instituted by Brentford against Hartford. (24)

(3) Where an insurer forms the view that he is not liable to indemnify his insured, then he has at least two options. The first is to refuse or withdraw cover in respect of any defence to the pursuer's action. In that event, if the third party proceeds with his action and secures decree against the person thought to be insured, the amount of the decree will be determinative of the liability of the insured to the third party unless and until that decree is reduced on the grounds of, for example, fraud or collusion. The insurer cannot normally re-open the question of the amount of the liability in circumstances where he has declined to enter the process and fund the defence to the action or has withdrawn his instructions and funding in the course of the action. The question of liability between the third party and the insured has to be litigated in an action between those two parties and a decree in that action has to be seen as a final determination of that liability so long as the decree stands unreduced. The second option is for the insurer to offer to instruct the defence to the action but make it clear ab ante, or at least as soon as possible, both to the third party and the insured, that his position is to remain that he is not liable under the policy. The choice is entirely for the insurer. If it chooses not to intervene, then, if a judgment is obtained against the insured, it would have to indemnify the insured if the policy defences pleaded by it should fail. (28 – 29)

Cases Referred to

Ben Shipping Co (Pte) Ltd v Ah Bord Bainne The C Joycei [1986] 2 All ER 177 (distd)
Cheltenham & Gloucester plc v Royal Sun Alliance Insurance Co (unreported, delivered on 30 May

2001) (not folld)
Mercantile Investment & General Trust Co v River Plate Trust, Loan and Agency Co [1894] 1 Ch 578 (distd)
Parker v Lewis [1873] 8 Chancery App 1035 (folld)
Post Office v Norwich Union Fire Insurance Society Ltd [1967] 1 All ER (refd)
Re Harrington Motor Co [1982] 1 Ch 105 (refd)
Tee Liam Toh v National Employer's Mutual General Insurance Association Ltd (unreported, OM No 50 of 1963) (refd)
West Wake Price & Co v Ching [1957] 1 WLR 45 (refd)

Legislation Referred to

Application of English Law Act (Cap 7A)
Third Parties (Rights Against Insurers) Act (Cap 395) s 1(1)

Judgment

GROUNDS OF DECISION

1. This is an appeal by an insurer, Hartford Insurance Co (Singapore) Ltd, against a decision of the High Court which held that Hartford is liable to indemnify an injured third party, the respondents, under an "all risk" policy (the policy). The issue which arose for consideration concerns the construction of s 1(1) of the English Third Parties (Rights against Insurers) Act 1930 (the 1930 Act), which statute was made applicable in Singapore by virtue of the Application of English Law Act (Cap 7A).

The background

2. The facts of the case are quite straightforward. The respondents, Chiu Teng Construction Co Pte Ltd ("Chiu Teng"), were the main contractors of a housing development located at the junction of Yio Chu Kang Road and Lentor Avenue known as "The Countryside" (the "estate"). Sometime in early January 1996, the insured under the policy, Brentford Construction (S) Pte Ltd ("Brentford"), was carrying out sheet-pile extraction works at an adjacent lot to the estate. These works caused soil movement which resulted in damage to some of the houses in the estate. Because of that, rectification works had to be carried out by Chiu Teng, which included the installation of some 30 micropiles as foundation supports for the boundary walls and retaining walls of the affected houses. Chiu Teng's engineer had doubts whether the frictional resistance of the existing foundation would be adequate to secure the structures and thus advised that the micropiles be installed. The costs of this item alone amounted to slightly more than 50% of the total expenses incurred by Chiu Teng in relation to the rectification works.

3. Under the terms of the policy, Hartford agreed to indemnify Brentford against "such sums which Brentford shall become legally liable to pay as damages" consequent upon accidental loss or damage to property belonging to third parties occurring in direct connection with the construction or erection works carried out by Brentford. Hartford also agreed, in respect of a claim for compensation to which the indemnity applied, that it would, in addition, indemnify Brentford against all costs and expenses of litigation which Brentford had to pay to the third party claimant.

4. On 24 April 1998, Brentford was wound up by an order of court, with the Official Receiver being appointed liquidator. Chiu Teng sought to recover the loss it suffered on account of the rectification

works from Brentford. In view of Brentford's winding up, on 12 February 1999, leave of court was obtained by Chiu Teng to commence proceedings against it. A writ was duly issued on 16 March 1999. On 11 May 1999, an interlocutory judgment was obtained with the consent of the Official Receiver. On 30 May 2000, an assessment of damages was conducted. Witnesses were called on behalf of Chiu Teng. The Official Receiver chose not to participate in the assessment. Judgment for the sum of $466,600.08 was granted to Chiu Teng, with interest at 6% p.a. from the date on which the writ was served on Brentford (collectively referred to as "the judgment sum"). We should add that Hartford was informed of this action but chose not to get involved as it felt it was not liable to Brentford under the policy. For convenience, this judgment shall hereinafter be referred to as "the earlier judgment".

5. On 11 August 2000, in reliance on s 1(1) of the 1930 Act, Chiu Teng commenced the present action against Hartford seeking payment of the judgment sum.

6. In the court below, Hartford raised two main lines of defence. The first line related to policy defences (i.e., that the damage caused did not fall within the scope of the policy), which the court below ruled were without any merits. Of course, if the court had held in favour of Hartford on these defences, then Chiu Teng, who stepped into the shoes of Brentford, could have no better claim against Hartford. A related defence, based on limitation, also failed. We need say no more on these policy defences because before us Hartford is not challenging these rulings of the court below.

7. The second line of defence was that the judgment sum obtained by Chiu Teng against Brentford was not binding on Hartford and, that Chiu Teng should prove all over again the quantum of their loss. In this defence, Hartford did not dispute Brentford's liability to Chiu Teng, but only the reasonableness of the latter's claim and, specifically, it said that it was wholly unnecessary for Chiu Teng to install the micropiles and that the costs incurred thereby should be irrecoverable.

8. The judge below, Woo Bih Li JC, also rejected this second line of defence. He held that Hartford was, by virtue of the earlier judgment, estopped from challenging the extent of liability or the quantum which the court had held Brentford to be liable to Chiu Teng. It was unnecessary for Chiu Teng to establish all over again the reasonableness of its claim. His reasoning was simply this: under the policy, Brentford was entitled to be indemnified by Hartford as to the judgment sum and as under s 1(1) of the 1930 Act, following the winding up of Brentford, Chiu Teng stepped into the shoes of Brentford, Chiu Teng should similarly be entitled to be indemnified by Hartford.

Appeal

9. Before us, the main contention of Hartford is that the judge below erred when he held that the earlier judgment obtained by Chiu Teng against Brentford was binding and conclusive as against Hartford. It argued that such a decision would require an insurer to engage itself in legal proceedings even before it is established that the insurer is liable to indemnify the insured in respect of the losses allegedly caused by the insured to a third party. This could not be correct. Unnecessary costs would thereby have to be incurred by the insurer and this, in turn, would have a detrimental effect on insureds in general, as it could lead to an escalation of premiums payable.

The authorities

10. The starting point for the consideration of the issue must be the case *Parker v Lewis* [1873] 8 Chancery App 1035 where the facts were somewhat complicated. The case involved the directors of a bank and two related companies in a scheme to deceive the Stock Exchange by making it appear

that one of the two companies had moneys which it did not have and to also make it appear that the company had allotted 40,000 shares which were paid for and which was not the case. The scheme was intended to deceive all the persons, who might be induced by means of that sham, into taking up shares in the company. Shareholders of the bank brought an action against the directors of the bank for an indemnity. The substantive decision of the case concerned a procedural point as to the proper party to bring an action on behalf of the company. However, Mellish LJ expressed the following *obiter dicta* as to what an indemnifier could dispute in a case of an express contract of indemnity:-

> "I think that the law with reference to express contracts of indemnity is, that if a person has agreed to indemnify another against a particular claim or a particular demand, and an action is brought on that demand, he may then give notice to the person who has agreed to indemnify him to come in and defend the action, and if he does not come in, and refuses to come in, he may then compromise at once on the best terms he can, and then bring an action on the contract of indemnity. On the other hand, if he does not choose to trust the other person with the defence to the action, he may, if he pleases, go on and defend it, and then, if the verdict is obtained against him, and judgment signed upon it, I agree that at law that judgment, in the case of express contract of indemnity is conclusive. But I apprehend it is conclusive on account of what the law considers the true meaning of such a contract of indemnity to be. It is obvious that when a person has entered into a bond, or bought land, or altered his position in any way on the faith of a contract of indemnity, and an action is brought against him for the matter against which he was indemnified, and a verdict of a jury obtained against him, it would be very hard, indeed, if, when he came to claim the indemnity, the person against whom he claimed it could fight the question over again, and run the chance of whether a second jury would take a different view and give an opposite verdict to the first. Therefore, by reason of that contract of indemnity, the judgment is conclusive; but in my opinion it is conclusive because that is the meaning of the contract between the parties, for it unquestionably is not the general rule of law that a judgment obtained by A against B is conclusive in an action by B against C."

11. In *Post Office v Norwich Union Fire Insurance Society Ltd [*1967] 1 All ER, the Court of Appeal reaffirmed the need for an insured (and in turn the injured third party who steps into the shoes of the insured under s 1 of the 1930 Act) to establish that he is legally liable to pay compensation to the third party before an action against the insurers to seek indemnity may be made. In that case the public liability policy provided that the insurer "will indemnify (the insured) against all sums which (the insured) shall become legally liable to pay as compensation in respect of … loss of or damage to property." The Post Office (the third party) sued the insurers claiming for the loss of damage in the sum of about 839, as statutory assignees of the insured by virtue of s 1(1) of the 1930 Act. The Court of Appeal noted that while the liability of the insured to the Post Office arose at the time of the accident, the "rights" of the insured against the insurers did not arise at that time but having regard to the scope of the policy, only when the insured's liability "to the injured person has been established" and, that liability must be "ascertained and determined to exist, either by judgment of the court or by an award in an arbitration or by agreement." Lord Denning MR specifically addressed the procedural problem which would arise where the insured was a company and had been wound up, as follows:-

> "How is this to be done? If there is an unascertained claim for damages in tort, it cannot be proved in the bankruptcy, nor in the liquidation of the company; but the injured person can bring an action against the wrongdoer. In the case of a

> company, he must get the leave of the court. No doubt leave would automatically be given. The insurance company can fight that action in the name of the wrongdoer. In that way liability can be established and the loss ascertained. Then the injured person can go against the insurance company."

12. Hartford relies on the case *Mercantile Investment & General Trust Co v River Plate Trust, Loan and Agency Co* [1894] 1 Ch 578 to contend that estoppel does not apply in the present case and that it is entitled to question the quantum of the loss suffered by Chiu Teng. In that case, an English company purchased the undertaking and property of an American company and covenanted to indemnify the American company against its debts and obligations. Pursuant to a power of compromise contained in a debenture trust deed given by the American company, a resolution was passed by a majority of the debenture holders accepting, in lieu of the debentures, shares in the English company. The Mercantile Company, which did not agree with the resolution on the ground that the condition necessary for the exercise of the power had not existed, absented itself from the meeting. It subsequently sued and obtained a judgment against the American company for arrears of interest due on their debentures. The English company assisted the American companies in defence of that action and even paid the costs thereof. In a second action, the Mercantile Company, suing on behalf of all the debenture holders, sought to enforce against the English Company and the lands assigned to them by the American company, the charge on such lands purported to be given by the debentures. The lands were located in Mexico. Due to an omission to effect registration of the charge, which registration was essential, the debenture holders thus never acquired a valid charge on the land according to the law of Mexico.

13. Romer J held that the judgment obtained by the Mercantile Company did not estop the English company from adducing evidence to show that through non-registration of the charge under the debenture, circumstances had existed which were sufficient to bring the power of compromise into operation and the resolution was therefore binding on the Mercantile Company.

14. In our view, the decision in that case is distinguishable and this can be gleaned from the following passage of Romer J (at 595):

> "In that action the (Mercantile company) were only seeking to enforce in this country a personal claim against the American Company; and the American Company in their defence and counter-claim were seeking to free themselves and their assets, including the land in question, from a personal claim and not from a claim constituting, if established, a valid charge on the land. Nothing was decided in that action which in any way bound the land,
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> Lastly, it was said that, inasmuch as the American Company defended with the knowledge and approval of the English Company, the latter would be estopped under their covenant of indemnity from disputing the judgment as against the American Company suing them on the express covenant of indemnity. That is quite true. But this is not an action on the covenant of indemnity. The estoppel last referred to is only between the party indemnifying and the party indemnified, and arises only by virtue of a term implied in an express covenant of indemnity."

15. Apart from the peculiar features in the case, it is important to note that there was, then, no

equivalent provision to s 1(1) of the 1930 Act which the court there had to consider. But it would be seen that Romer J held that estoppel would have applied if the American company were to sue the English company on the indemnity. The effect of s 1(1) is to enable Chiu Teng to step into the shoes of Brentford. On the principle spelt out by Romer J, if Brentford were to sue Hartford, the latter would be estopped. And since under s 1(1) Chiu Teng stepped into the shoes of Brentford, Hartford should similarly be estopped in the action by Chiu Teng.

16. A Malaysian case, *Tee Liam Toh v National Employer's Mutual General Insurance Association Ltd* (unreported) (OM No 50 of 1963), is also pertinent. There, the plaintiff who was the employer of an employee-driver, took out a workman's compensation policy with the insurers. The driver, while loading some goods collapsed and died of heart failure. The dependants of the driver claimed for workmen's compensation. The employer disputed the claim. The arbitrator under the Workmen's Compensation Ordinance ruled against the employer-plaintiff (first arbitration). The plaintiff claimed for indemnity under the policy against the insurers who resisted the claim. The dispute went before an arbitrator (second arbitration) who held that the driver's death was due to natural causes and that the injury did not arise out of or in the course of the employment. Accordingly, the insurers were held not liable to indemnify the employer-plaintiff and the latter in turn moved the High Court to have the second award remitted for re-consideration or set aside. Ong J held that as the first arbitration was properly constituted and an award was given, the insurers were precluded from raising the same question again before the second arbitration and they should pay the employer-plaintiff in accordance with the Workmen's Compensation policy unless they could show that the employer-plaintiff was in breach of any of the conditions of the policy. As there was an error on the face of the second award in not giving effect to the estoppel, Ong J remitted the second award for re-consideration by the arbitrator. In coming to his decision, Ong J had relied upon the views expressed by Mellish LJ in *Parker v Lewis* (quoted in 10 above). He amplified his ruling as follows:-

> "… with full notice of a claim against their insured, the insurance company elected to lift not a finger to assist their insured or protect themselves by defending the claim. Under condition three they had the right to take over conduct of the defence against the claim put forward by the dependants of the deceased, and, if dissatisfied with the decision, they should have appealed. Having left their insured to carry the burden, they nevertheless subsequently insisted on raising the very same questions before the arbitrator which had already been decided by a competent tribunal against their insured. Of course, they are precluded by the decision of the learned President, as arbitrator, from agitating these questions again."

17. We should add that counsel for Hartford does not question the decision in *Tee Liam Toh* but only seeks to distinguish it from the present case on the basis that in the earlier action by Chiu Teng against Brentford, the latter did not dispute the quantum of claim of Chiu Teng, whereas in *Teo Liam Toh* the questions of liability and quantum were thrashed out in the first arbitration. It is therefore necessary for us to determine whether this distinction is really valid in the context of s 1(1).

18. There are two other cases cited by Hartford which we must refer to. The first is *Ben Shipping Co (Pte) Ltd v An Bord Bainne The C Joyce* [1986] 2 All ER 177. There, cargo owners claimed damages against the shipowners for damage to cargo and short delivery. The shipowners invited the charterers to take over the defence on the basis that under the terms of the charterparty the ultimate responsibility for the loss of the cargo would rest with the charterers. The charterers refused to accept the invitation presumably because they did not think they had to indemnify the shipowners. The shipowners settled the claim and sought to be indemnified by the charterers. Bingham J (as he then was) held that the charterers were not liable under the charterparty to indemnify the

shipowners. However, he went on to express the view that, even if the charterers were so liable, they were not precluded from contesting the liability of the shipowners to the cargo owners and/or the reasonableness of the settlement of the claim. We think it highly relevant to note the conclusion of Bingham J where he said (at p. 187):-

> " … to succeed in their estoppel claim, the shipowners must establish as a matter of law that having given notice to the charterers of the claim made against them (the shipowners) in South Africa, and the charterers having declined to conduct the defence, and the shipowners having compromised the claim, they (the charterers) are estopped from contesting the liability of the shipowners to the third party in South Africa and the reasonableness of the compromise and the incurring of costs, even though there was no express contract of indemnity and the charterers bona fide and on reasonable grounds challenged the shipowners' right to indemnity and the claim was settled without immediate reference to the charterers. I do not think any such principle can be clearly found in the authorities relied on. Nor do I think it desirable to attempt to lay down such a far reaching principle. It is of course good sense and common practice for a defendant to give notice of a claim against him and any proposed settlement to a person against whom he intends to seek indemnity or contribution, if such person is not joined as a third party. This gives that person the opportunity to raise any points or objections he wishes, and will make it somewhat harder for him to raise arguments later which he could have raised at the time. It is, however, a large stride from a commonsense tactical practice to a rule of law. The present case is a good example of how unfairly such a rule could work. The charterers did not (it seems reasonable to infer) believe they were bound to indemnify the shipowners against the South African claim. Even if one assumes that they were wrong in that belief, it remains the fact that they need have had and in all probability had no knowledge at all of how the cargo damage occurred. Having dissociated themselves from the proceedings they knew nothing of the terms of settlement. The rule contended for would present the charterers with a choice between taking over the defence of a claim which they believed to be nothing to do with them and thereafter (if that belief was falsified) finding themselves bound to indemnify the shipowners against settlement of a claim even though the claim could be shown to be ill-founded or the settlement unreasonable. The authorities may well support, and I can see virtue in, a much more limited principle, but that would not avail the shipowners here." (emphasis added).

19. The second is the recent Scottish case, *Cheltenhem & Gloucester plc v Royal & Sun Alliance Insurance Co* (delivered on 30 May 2001) where the Inner House (Court of Session), overruling a decision of the Outer House and held that the insurers were entitled to dispute the insured's liability to the third party as part of a defence to a claim under the insurance policy bought by the insured, even if that liability had already been established by a court judgment. There, the plaintiffs sued a solicitor for professional negligence. The solicitor's insurers investigated the plaintiff's claim and, for a time, conducted the solicitor's defence, before withdrawing from that proceeding in the belief that they could avoid liability under the policy. The solicitor did not thereafter defend the action and judgment was given against him. The Inner House held that, in those circumstances, the insurers were entitled to dispute the insured's liability to the plaintiffs in the action brought by the plaintiffs under s 1(1) of the 1930 Act. The court, proceeding on the basis that there was no authority on point, reasoned (at 10):-

> "In other words, the pursuers' rights are co-extensive with, but no greater than, St Clair's (the solicitor's) rights against the defenders. That being so, the decree in the sheriff court action between the pursuers and St Clair will be conclusive as to St Clair's liability in damages for the purposes of the present action at the instance of the pursuers only if it would also be conclusive for the purposes of an action against the defenders at the instance of St Clair. So, supposing that St Clair had been found liable in damages to the pursuers in the sheriff court action, would the defenders have been prevented from challenging that liability and its amount in any proceedings which he brought against them to enforce the indemnity under the insurance policy? In general terms, part, at least, of the answer is clear: the matter would not be *res judicata*, since the parties to the two actions would be different and the *media concludendi* would also be different. The existence of the sheriff court decree would therefore give St Clair the necessary interest to sue the defenders but it would not prevent them from reopening the matter in an action against them at his instance. For this reason the existence of the sheriff court decree cannot, in itself, prevent the defenders from reopening the matter in the present action where the pursuers stand in St Clair's shoes."

20. The Inner House also dealt with the prevailing problem which the enactment of the 1930 Act was intended to overcome as follows (at 12):-

> "Parliament solved the problem by enacting the provisions of Section 1 which in effect assigned the insured's rights against the insurer to the third party. But there is nothing in the terms of the 1930 Act or in the aims of the legislation that would justify the inference that Parliament intended to give the third party any additional advantage which would not be available to the insured in any action at his instance against the insurer."

21. As far as *Ben Shipping* case is concerned, it is clearly distinguishable as it did not deal with an express obligation to indemnify but with a supposedly implied obligation of indemnity. It must be confined to its fact situation as the passage of Bingham J which we have cited at 18 above shows. There were also special features there which seemed to have played a part in the overall determination of the case. It would be noted that Bingham J did not rule that the indemnifier could never be bound. He recognised that the authorities could well support a "much more limited principle."

22. As regards *Cheltenhem & Gloucester* case, we note that the Inner House, in coming to its decision, had relied upon *Ben Shipping*. With respect, we think insufficient consideration was given to the distinguishing factors in *Ben Shipping* which we had identified above.

23. Counsel for Chiu Teng further seeks to distinguish *Cheltenhem & Gloucester* on the basis that the wording of the operative clause of the indemnity was different. There, it was stated that the insurers would "indemnify the insured against liability at law for damages and claimant's costs and expenses in respect of a claim … made against the insured … by reason of any negligent act, neglect or omission on the part of the … insured … occurring or committed … in good faith." In contrast, in our case, the insurer was to indemnify Brentford against "such sums which Brentford shall become legally liable to pay as damages." While the two clauses are indeed different, we do not think there is any real difference in effect, since in this case and in *Cheltenhem & Gloucester* there is, in each instance, a judgment against the insured.

24. What is clear is that the Inner House seemed to be concerned with the doctrine of *res judicata*.

As we see it, the real point is one of contract. The question to ask is, following from the first judgment, is there a sum which Brentford is legally liable to pay to Chiu Teng as damages. The answer is a definite yes. The wording of the policy is clear: the insurer (Hartford) shall indemnify the insured (Brentford) against such sums which Brentford shall become legally liable to pay as damages. This condition is satisfied. It is not open to Hartford to challenge that judgment; they were notified of the claim. To permit such a challenge as to the extent of liability of Brentford to Chiu Teng, and consequently the quantum thereof, would risk there being an inconsistent judgment and the insured being indemnified less (or none at all) than what the policy provides. And as by virtue of s 1(1), Chiu Teng stepped into the shoes of Brentford, Chiu Teng should be indemnified by Hartford. There is no question of Chiu Teng being given any additional advantage which would not be available to Brentford in any action instituted by Brentford against Hartford.

25. Generally, and as stated by Romer J in *Mercantile Investment & General Trust* (supra), a judgment is only binding as between the parties to the action, except in the case of an express indemnity given by a third party to a party to the action.

26. At common law, Chiu Teng would have no claim against Hartford, the insurer: *Re Harrington Motor Co* [1928] 1 Ch 105. Now, because of the winding up of Brentford, s 1(1) enables Chiu Teng to step into the shoes of Brentford. Brentford's right to be indemnified in respect of the liability is, under s 1(1), transferred to Chiu Teng. It is not open to Hartford to reopen the question of quantum of loss. Judgment had already been obtained on that. As stated by Devlin J in *West Wake Price & Co v Ching* [1957] 1 WLR 45 at 49, "The essence of the main indemnity clauses is that the assured must prove a loss. The assured cannot recover anything under the main indemnity clause or make any claim against the underwriters until they have been found liable and so sustained a loss."

27. We do not think it should make a difference whether the judgment obtained against the insured is after a trial or on admission, so long as notice was given to the insurer to defend the claim of the injured third party if it wished. Unlike the charterers in *Ben Shipping*, who did not know how the loss occurred, here it is Hartford who is raising the point that the installation of the micropiles was unnecessary after judgment was given against Brentford. We would mention that Hartford's loss adjusters were kept informed by Chiu Teng's loss adjusters on the list of defects and the proposed rectification works. Nothing was raised by Hartford's loss adjusters about the need or otherwise of the micropiles. It is absurd to require an insured to contest a claim, or the quantum thereof, if he does not have any basis to contest it.

28. We would, therefore, respectfully decline to follow the decision of the Inner House in *Cheltenhem & Gloucester* and instead say that we agree with the approach taken by the Outer House, which broadly followed the opinion expressed by Mellish LJ in *Parker v Lewis* (see 10 above). It said:-

> Where the insurer, on the other hand, forms the view that he is not liable to indemnify his insured, then he still has at least two options. The first is to refuse or withdraw cover in respect of any defence to the pursuer's action. In that event, if the pursuer proceeds with his action and secures decree against the person thought to be insured, the amount of the decree will be determinative of the liability of the insured to the pursuer unless and until that decree is reduced on the grounds of, for example, fraud or collusion. The insurer cannot normally re-open the question of the amount of the liability in circumstances where he has declined to enter the process and fund the defence to the action or has withdrawn his instructions and funding in the course of the action. The question of liability between the pursuer and the insured has to be litigated in an action

between those two parties and a decree in that action has to be seen as a final determination of that liability so long as the decree stands unreduced.

The second option is for the insurer to offer to instruct the defence to the action but make it clear *ab ante,* or at least as soon as possible, both to the pursuer and the insured, that his position is to remain that he is not liable under the policy.

29. The choice is entirely for the insurer. If it chooses not to intervene, then, if a judgment is obtained against the insured, it would have to indemnify the insured if the policy defences pleaded by it should fail. As regards the concern raised that if this court should uphold the decision of the court below, it could lead to an escalation in premiums, we would make three observations. First, this is not a legal point. Secondly, a term which gives the insurer the right to conduct the defence of the insured is commonplace in most insurance contracts and such a term is in the policy issued by Hartford to Brentford. Thirdly, while each insurer will set its own premium rates, in a free and competitive economy, the market will ultimately dictate the acceptable levels.

Judgment

30. In the result, the appellant's (Hartford's) appeal is hereby dismissed with costs. The security for costs, together with any accrued interest, shall be paid out to the respondent (Chiu Teng) or its solicitors to account of its costs.

Sgd:

YONG PUNG HOW
CHIEF JUSTICE

Sgd:

L P THEAN
JUDGE OF APPEAL

Sgd:

CHAO HICK TIN
JUDGE OF APPEAL